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No. 83-2046

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH BERRY
Appellant

vs.

MICHIGAN RACING COMMISSIONER
Appellee

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
(Counsel of Record)

Charles D. Hackney
Theodore S. Klimaszewski
Nelson W. Westrin
Assistant Attorneys General

Attorneys for Appellee
The Michigan Racing Commissioner

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COUNTERSTATEMENT OF QUESTION PRESENTED

May the State of Michigan, under its police power, impose strict liability as a condition of licensure on a trainer of horses involved in pari-mutuel racing by making the trainer the absolute insurer of the condition of horses he enters to race pursuant to MCL 431.71(4) and Michigan Administrative Code 1979 AACS R 431.62(b)(7)?

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Appellee

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM

Appellee, the Michigan Racing Commissioner, in accordance with Rule 16, moves the Court to dismiss the appeal herein, or, in the alternative, affirm the Judgment below for want of a substantial Federal question, and because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Appellee further moves the Court to dismiss the appeal, as it is not within the jurisdiction of this Court, since it was not pursued in conformity with 28 USC 1257(2), in that the decision appealed was not ". . . rendered by the highest Court of a State in which a decision could be had. . . ."

COUNTERSTATEMENT OF THE CASE

The Michigan Racing Commissioner, accepts Joseph Berry's statement of the case subject to the following additions and clarifications:

Joseph Berry was the trainer of "Quick Ideal" and "Miracle Blend", who participated in separate races held on February 7, 1981 and February 14, 1981, respectively, at Northville Downs, Northville, Michigan. Post race urinalysis of each horse revealed the presence of apomorphine which, when administered to horses, acts as a stimulant.

The Stewards at Northville Downs, following separate hearings, issued rulings on February 19, 1981 and February 26, 1981, wherein they suspended Joseph Berry for 365 days for each finding of apomorphine to run consecutively.

Joseph Berry appealed the Stewards' decisions, and a *de novo* appeal hearing was held on March 27, 1981. At the *de novo* hearing, Joseph Berry was represented by counsel. A hearing transcript was prepared and will be referred to as (HT-) followed by the page number.

Mr. Berry's counsel, during testimony offered by a track steward, Dana Taylor (HT-95, 96), objected to Mr. Taylor's recollection as to whether there was any testimony given at one of the Stewards' hearings which would shed light on why the horse came up with a positive test of apomorphine, and, as justification for the objection, stated that "Mr. Berry requested of the presiding steward at the hearing, Mr. (Richard) Rudnicki, if he could have an attorney participate in the proceedings, and he was advised your attorney can come but he has to keep his mouth shut. There was no sense for me to come there if I couldn't talk." Mr. Taylor stated (HT-102) that he did not tell Mr. Berry that he could not have an attorney present but he did justify what Mr. Rudnicki apparently told Mr. Berry by stating that ". . . his attorney could not participate in cross-examination." Also, "That we were not going to get into a court proceeding and have a shouting match and have it taken over like it was at Hazel Park" and "That you could come as an observer" (HT-101, 102).

Mr. Taylor, in justifying why Mr. Rudnicki apparently advised Mr. Berry that his attorney would have to be quiet, stated "This happened for a reason. We have had hearings where attorneys have been present, they get into a shouting match back and forth, a legal shouting match. We conduct hearings of fact finding." (HT-97).

Counsel for the Racing Commissioner, made reference to a hearing held August 17, 1979, regarding Mr. Berry, who was represented by the same counsel, and referred to a heated verbal debate that disrupted the hearing (HT-98). He attempted to read into the record some of the exchanges that went on between Mr. Berry's counsel and the opposing counsel (HT-101).

The two parties to this conversation, Mr. Berry and Mr. Rudnicki, did not testify as to their actual statements. Mr. Rudnicki testified at the hearing but was not examined regarding this incident (HT 181-185). Mr. Berry offered no testimony whatsoever.

The Court below examined this issue and concluded that the stewards clearly erred in suppressing counsel's participation at the Stewards' level, but, since Mr. Berry was subsequently afforded a full *de novo* hearing, with counsel present, the requisites of due process were thus complied with (Appellants' Appendix at 18a, hereafter "App").

Mr. Berry's suspensions were primarily based on Michigan Administrative Code 1979 AACS R 431.62(b)(7)(8) (App 4a, 5a) and MCL 431.71; MSA 18.966 (App 1a-3a), which provides that the trainer is responsible for and the absolute insurer of the condition of the horse he enters to race. The statute and rule are referred to as Michigan Insurer's Rule (hereinafter referred to as "MIR").

In addition to the MIR, one Steward, Dana Taylor, took into consideration the fact that Mr. Berry testified at one of the Stewards' hearings that he told his veterinarian that his horse "Miracle Blend" was sulking, it wasn't putting out, that he had liked for him to "break him loose" but had he known apomorphine was the drug, he would not have let the veterinarian use it (HT-113, 114).

Another Steward, Frank Utter, testified that in addition to the MIR he based his decision to suspend Mr. Berry on the fact that "by the direction of Mr. Berry, the veterinarian that was present at the hearing had administered this particular drug into the horse. . . ." (HT-166).

App 34a-35a, itemizes 20 exhibits that were admitted at the *de novo* appeal hearing held March 27, 1981.

Exhibit 18 is a log book for the year 1981 maintained by Mr. Berry's veterinarian, Dr. Oram Woolpert. An entry for the date of February 3, 1981, indicates that he administered apomorphine to Mr. Berry's horse "Quick Ideal." This entry is peculiar as it is made on the very first line of the page and it is quite apparent from a review of the entire log book that Dr. Woolpert normally leaves the first line clear and usually skips a line before making a new entry.

Mr. Woolpert was called as a witness (HT-85), and during direct examination on how he enters notations in his log book, Mr. Berry's counsel interrupted and suggested (HT-87) that someone should advise Dr. Woolpert of his constitutional rights and the right against self-incrimination. Mr. Berry's counsel, advised Dr. Woolpert (HT-90, 91) on the procedure to use if he wants to take the Fifth Amendment.

Dr. Woolpert subsequently (HT-90) utilized his Fifth Amendment privilege and refused to answer additional questions.

An entry on the log book for February 9, 1981, reveals that Dr. Woolpert injected apomorphine in "Miracle Blend" which was also trained by Mr. Berry.

Exhibit # 20 is a narcotics ledger maintained by Dr. Woolpert and it is maintained in alphabetical order. Under the page "b", Dr. Woolpert substantiates the fact that he administered apomorphine to horses for "J. Berry", specifically "Q Ideal" on February 3, 1981, and "Blend" on February 9, 1981.

ARGUMENT

I

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The State of Michigan may, under its police power, impose strict liability as a condition of licensure on a trainer by making him the absolute insurer of the condition of horses he enters in a pari-mutuel race.

Gambling on horse races is *malum prohibitum* and was legalized in Michigan by legislation that includes strict licensing, regulation and enforcement provisions such as the MIR.

The MIR was enacted for a valid purpose. It protects the betting public, jockeys, drivers and horses by insuring that the horses entered to race at state regulated pari-mutuel tracks are free from prohibited drugs that could defraud the bettors or cause horses to break down, thereby endangering lives of horses and participants.

Joseph Berry contends that the MIR violates the due process clauses of the U.S. Constitution by creating an irrebuttable

presumption of fault whereas the MIR, realistically, as a condition of licensure, imposes strict liability on the trainer by making him the insurer of the condition of horses he enters to race.

Black's Law Dictionary, 5th Edition, page 726 defines "insure" as "to make sure or secure, to guarantee, as, to insure safety to anyone". The MIR, as the name implies, makes the trainer the insurer of the horse's condition.

The trainer of race horses is the most important individual in racing, as he controls the horse's feeding, medication, training, security and selects drivers or jockeys. The trainer also hires employees such as assistant trainers, grooms and hot walkers, enters horses to race and arranges for transportation of horses.

In view of his responsibilities, the trainer is the most logical person to hold responsible for the condition of a horse at race time. Someone has to be responsible not only for the protection of the betting public, but also for the protection of the horse as it is inhumane to race a horse on a stimulant, depressant or painkiller.

The imposition of strict liability on the trainer is clearly and directly related to the State's effort to provide its citizens and race participants, honest and safe horse races. The MIR is reasonable and essential to the regulation of an industry wherein the danger of fraud and corruption is well recognized.

Strict liability, where the public welfare is concerned, has been upheld in numerous instances and is not incompatible to the due process clause of the Fourteenth Amendment especially where there is a clearly expressed legislative intent to impose such liability. *United States* v *Balint*, 258 US 250; 42 S Ct 301; 66 L Ed 604 (1922); *United States* v *Dotterweich*, 320

US 277; 64 S Ct 134; 88 L Ed 48 (1943) reh den 320 US 815 (1943); *Sandstrom* v *California Horse Racing Board*, 31 Cal 2d 401; 189 P2d 17, cert den, 335 US 814 (1948); *United States* v *Park*, 421 US 658; 95 S Ct 1903; 44 L Ed 2d 489 (1975).

The National Association of State Racing Commissioners publishes uniform rules for the guidance of State Racing Commissioners and their Rule No. 10.01 adopted in 1958 is as follows:

> "The trainer shall be responsible for and be the absolute insurer of the condition of the horses he enters regardless of the acts of third parties."

There are approximately 24 states that have significant pari-mutuel horse racing and all of them have a Trainer's Responsibility Rule. The majority have a rule similar to the MIR.

Courts that have held the "Absolute Insurer's Rule", such as the MIR, to be unconstitutional found that the rule creates an irrebuttable presumption of guilt and therefore violates due process. See *Brennan* v *Illinois Racing Commission*, 42 Ill 2d 352; 274 NE2d 881 (Ill 1969); *Mahoney* v *Byers*, 187 MD 81, 48, A2d 600 (Md 1946) and *State* v *Baldwin*, 159 Fla 165; 31 So2d 627 (Fla 1947).

The vast majority of courts that have addressed the constitutionality of the Insurer's Rule, similar to the MIR, have held that the rule is constitutional. E.g. *Solimena* v *State Dept of Business Regulation, etc.*, 402 So2d 1240; pet for rev den, 412 So2d 470 (Fla 1982); *Division of Pari-Mutuel Wagering, Dept of Business Regulation* v *Caple*, 362 So2d 1350, on remand; 363 So2d 416 (Fla 1978). *Dare* v *State*, 159 NJ Super 533; 388 A2d 984 (1978); *Fioravanti* v *State Racing Commission*, 6 Mass App 299; 375 NE2d 722 (Ma 1978); *O'Daniel* v *Ohio State Racing Commission*, 37 Ohio St 2d 87; 307 NE2d 529

(Ohio 1974); *Fogt* v *Ohio State Racing Commission*, 3 Ohio App 2d 423; 32 Ohio Ops 2d 546; 210 NE2d 730 (Ohio 1965); *Hodges* v *Alberta Racing Comm'n*, No. 14068 (Alberta, Can. Ct of App) (1982).

In *Solimena* v *State Dept of Business Regulation*, *supra*, the District Court of Appeals of Florida stated that

> "In our view, the absolute insurer rule reflects an appropriate legislative purpose: prevention of the influencing of race results by the use of drugs. Legalized gambling operates only by permission of the state. . . ."

The last previous test of Florida's absolute "Insurer's Rule" was in *Div of Pari-Mutuel Etc* v *Caple*, *supra*, wherein the Florida Supreme Court overruled its decision in *State* v *Baldwin*, *supra*.

In the *Caple* case, the Florida Supreme Court stated that *Baldwin*:

> ". . . did not consider the power of a state to impose strict liability, the existence of which is the fundamental basis of our determination. Also, it would appear that the decision in the *Baldwin* case was influenced decisively by analogy to *Mahoney* v. *Byers* . . . where the mechanics rested in the employment of a presumption as conclusive evidence. . . .
>
> '[I]t is not unreasonable, arbitrary or capricious to provide that the trainer guarantee the condition of a horse running in a race upon the results of which there is wagering.'"
> (Citation omitted)

The Supreme Court of Florida also referred to *Brennan v Illinois Racing Board, supra,* which was cited in Mr. Berry's brief and discussed in 74 Dickinson L. Rev. 303 (1970), n. "Brennan v. Illinois Racing Board; The Validity of Statutes Making a Horse Trainer the Absolute Insurer for the Condition of his Horse". The Florida Court stated:

> "So far as we can determine, the Illinois Supreme Court is the only court that has held the absolute insurer rules unconstitutional since Baldwin . . . It is noteworthy, however, that in both Baldwin and in Brennan the prohibited drugs had in fact been administered to the horse by someone other than the trainer."

The Supreme Court of Florida concluded by stating that the Florida Division of Pari-Mutuel Wagering, Department of Business Regulation rule that makes the trainer the absolute insurer of the condition of his horse is a:

> ". . . reasonable means of eliminating or minimizing the possibility of illegal drugging, *by placing total responsibility on the person most capable of controlling the problem.*" (Emphasis added)

On page 13 of his Jurisdictional Statement, Mr. Berry cites a law review article "Brennan Revisited: Trainer's Responsibility for Race Horse Drugging", 70 Kentucky Law Journal, 1103, 1129 (1981-82) which states that a conscientious racing commission can maintain the integrity of racing, as many commissioners have demonstrated under a trainer responsibility rule based upon the fault and culpability of the trainer. In the same paragraph, the authors state that a trainer's responsibility rule that imposes either absolute liability or strict liability without proof of fault not only is consistent with long established legal precedent concerning public welfare regulation but also affords the public a maximum of protection against horse drugging.

The authors clearly cited various valid alternatives to drugging problems and it is for each legislature to decide what form their Trainer Responsibility rule should take.

The Michigan Court of Appeals was correct in its conclusion as to the constitutionality of the MIR when it stated that:

> " . . . the insurer rule constitutes a proper exercise of police power inasmuch as (1) it seeks to advance a valid public purpose and (2) it provides a remedy that is reasonably related to that public purpose. . . ." (App 14a)

Regardless of the fact that the MIR imposes strict liability on the trainer, all rulings by the stewards are discretionary.

Rule 431.62(b)(8) provides that:

> "If the chemical analysis of a sample indicates a presence of a drug or unreported controlled medication the trainer of the horse and any person shown to have the care or attendance of the horse or shown to have administered the drug . . . is subject to disciplinary action." (App 4a, 5A)

A trainer is given two opportunities to explain the circumstances and deny any participation of improper conduct. The first opportunity occurs at the Steward's hearing and the second at a *de novo* hearing appealing the Steward's ruling. These hearings allow evidence to modify severity of the penalty levied including whether or not a penalty should be levied.

At a *de novo* hearing held February 12, 1981, Donald L. McIlmurray, Sr. appealed a 60 day Michigan Stewards' suspension upon a finding that his horse raced on January 2, 1981 with procaine in its body. The testimony and evidence established that his 16 year old son, Donald L. McIlmurray, Jr. administered the medication. The Michigan Racing Commis-

sioner ordered that the decision of the stewards revoking McIlmurray's license be reduced by four days, that is, the period of time between the effective date of the stewards' ruling and the date the stay was granted by the Commissioner and further ordered that the remaining period of revocation be waived upon the payment of a $300.00 fine by McIlmurray, Sr. The Stewards subsequently held McIlmurray, Jr. responsible for the prohibited drug and ruled him off the grounds for the remainder of 1981.

Therefore, Mr. Berry was not without relief under the MIR; however, he did not testify and did not present any witnesses or present one scintilla of evidence that might shed some light on why apomorphine was administered to the horses under his control. If any evidence was presented, it certainly would have been considered.

II

APPEAL WAS NOT MADE IN ACCORDANCE WITH 28 USC § 1257(2)

In his notice of appeal, Joseph Berry appealed the Michigan Supreme Courts' Final Order of February 28, 1984 denying his Motion for Reconsideration of the Michigan Supreme Court's Order of September 21, 1983 denying his application for leave to appeal.

28 USC § 1257(2) requires that an appeal from a state court be by the highest court of a state in which a decision could be had. The Michigan Supreme Court did not decide the merits of Mr. Berry's case but merely denied leave to appeal and motion for reconsideration.

Therefore there is no jurisdiction under 28 USC 1257(2) and Mr. Berry's appeal should be dismissed as the Michigan Court of Appeals was the highest court of the state in which a decision could be had. *Michigan-Wisconsin Pipe Line Co* v *Calvert*, 347 US 157 (1954); Levy, Herbert Monte, "How to Handle An Appeal" (Practicing Law Institute Ed 1968), Ch 12, p 1209; *Siegel* v *Association of the Bar of the City of New York*, 5 NY2d 707, 708; 179 NYS2d 1029 (NY 1958), cert den, 359 US 552 (1959).

CONCLUSION

Mr. Berry's appeal should be dismissed or affirmed for failure to present a substantial federal question, because the lower court's decision was correct and because jurisdiction is lacking.

Respectfully submitted

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Charles D. Hackney
Theodore S. Klimaszewski
Nelson W. Westrin
Assistant Attorneys General

Agriculture & Lottery Division
Plaza One Building, Suite One
Lansing, Michigan 48913

Dated: June 28, 1984